Report from the Certiorari Clinic: Impressions of Routine Capital Cases

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The Certiorari Clinic at Northeastern University School of Law provides students the opportunity to do useful work in death penalty cases in an abbreviated time frame (an academic quarter) by focusing on a single step present in virtually every case—the petition to the United States Supreme Court for a grant of certiorari. Over the past decade, students have prepared petitions in more than one hundred capital cases from a dozen different states. This Commentary explains how this enterprise is organized and why it is worthwhile. I also report upon what a decade of wide but shallow exposure to capital cases reveals in terms of the evidence and advocacy necessary to secure a conviction and death sentence. Death cases are consistently, if infrequently, pursued and won on the basis of evidence that should, but apparently does not, create more than a lingering doubt about guilt. When it comes to the evidence necessary for conviction and sentence, death *is not* different.

I. THE CLINIC DESCRIBED

The organization of the clinic is simplicity itself. I am the "faculty" and the instruction occurs in my office, although the files and student work space are located in the law school clinic. Interested students identify themselves four to six weeks before the start of an academic quarter by submitting some form of legal writing prepared after the first year demonstrating basic proficiency in research, analysis and exposition. I then look for cases (two students to a case) by contacting capital resource offices in various states. Over the years, the cases have come from twelve different states beginning with Texas, but currently North Carolina, Pennsylvania, and Alabama provide the largest number. Other than that the petition be due no less than six weeks after the beginning of the academic quarter, there are no requirements in terms of the kind of cases or the quality of issue that we will undertake. Perhaps one should strive to insure that students work on cases presenting well-developed, intellectually challenging issues. However, these selection criteria are neither realistic, given the time constraints described below, nor responsive to what the resource centers are seeking when they want someone to do a certiorari petition. They also trade off one kind of

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educational experience (writing a legal argument based upon a rich record with well-developed issues) for another (creating a respectable legal argument out of a sparse record with poorly developed federal issues) that might be equally or even more valuable for anyone who wants either to understand capital litigation or to prepare for doing it.

Unless the circuit justice grants an extension, certiorari petitions must be filed within ninety days of the final judgment of the highest state court with jurisdiction. Ninety days is also the length of an academic quarter. Since the clinic's work has to begin immediately with the start of the quarter, the lawyers involved must agree that the case will be ours as of the start of the quarter. They can only make this commitment with respect to cases which have already been decided and as to which the clock has begun to tick. Thus, virtually all the cases come to the clinic with fewer than ninety days remaining to file a petition, and in some cases it may be as few as forty-five days or even less.

After an initial organizational meeting, students are divided into teams and the cases assigned. From that point until the petition is filed, all instruction takes the form of meeting with each pair of students and working with them to produce a credible certiorari petition. This translates into an initial meeting to discuss the case and what they should be looking for in terms of issues to present in a petition, a second meeting at which we identify the issues they are going to pursue, and a series of meetings—between five and eight, depending on the case and the students—at which I review drafts of arguments and eventually drafts of the petition. The students work with the briefs and record (particularly the trial transcript) developed at trial and on appeal. A typical petition goes through four to five drafts, each of which I review, comment upon, and discuss with the students.

There is no classroom component. When the clinic first began, I included such a component but soon learned that it was difficult to do anything useful in that setting either in terms of examining issues relating to the death penalty or criminal procedure, or in terms of skill enhancement. There tends to be no overlap of the issues that seem worthy of a certiorari petition among the cases we handle in a given quarter. Indeed, there is no guarantee that whatever constitutional issues exist will have anything to do with capital punishment *per se.* Moreover, the classroom component was not effective because each case was on its own schedule so that students were at very different places at any point in the quarter in terms of what they were doing. Finally, I believe that there is great education in the *doing* and that many people learn best by working on a concrete task. Putting all my energy into working with the students on specific petitions conforms to my pedagogical predilections (not to mention those of my institution).[1] Someone who is committed to collective reflection could enhance the experience through the addition of a classroom component, although the practical problems noted above would remain.

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[1] Daniel Givelber et al., *Learning Through Work*, 45 J. LEGAL EDUC. 1 (1995).

The typical petition is between twenty-five and thirty-five pages in length, although a few are longer. It depends upon the issues and what there is to say about them. Length has little to do with difficulty. The most challenging petitions are those in cases in which the trial and appellate lawyers abjure extensive (occasionally *any*) discussion of the United States Constitution and decisions of federal or state courts interpreting it. State appellate courts do not go out of their way to identify and decide federal issues when the parties do not raise them, yet a certiorari petition can only ask for a review of state decisions concerning federal law. This means that the students either have to identify the traces of federal constitutional doctrine in the state authorities which are presented and discussed, or identify federal issues that were raised in the proceedings before, at, or after trial and demonstrate why, under state law, these were necessarily resolved by the opinion affirming the conviction on appeal. Not infrequently, drafting the section of the petition entitled "How the Federal Issues Were Raised and Resolved Below" is as challenging as drafting the core of the petition—the "Reasons Why the Petition Should Be Granted."

Each student typically takes responsibility for one argument, so that the petition presents two questions to the Court. This is an area where the pedagogical needs (each student should have her own issue to develop) may appear to be in tension with the accepted wisdom concerning effective advocacy—presenting a single strong argument stands a greater chance of securing the Court's attention than the presentation of multiple, unconnected arguments. The tension actually presents itself rarely (there are not that many capital cases presenting fresh constitutional challenges that received significant treatment by the state's highest court), and on those occasions the students do work on the same issue.

Why do this? Not because you fantasize about securing a grant and arguing a case before the Supreme Court. Certiorari grants may not be entirely predictable, but they are not random events either. It would take a desperate lawyer at a resource center to decide knowingly to turn over to students a case presenting likely issues. And the Court does not typically reach to decide issues that have escaped the notice of the state supreme court.

My reasons fall into three categories. First, preparing a petition can be a terrific educational experience for students in terms of developing research, advocacy, and writing skills. The time limits, combined with the requirement that the issue is one that was necessarily decided below, mean that students can and do complete the task in its entirety even within an eleven-week academic quarter. They have the satisfaction of doing a single piece of a very lengthy and complex litigation in its entirety. It can also be a revealing introduction to our system of capital punishment through the lens of a single case involving (frequently) a defendant with somewhat marginal intellectual and psychological capabilities who has been found guilty of a brutal and senseless crime and been represented by a lawyer who may have lacked the resources (occasionally in every sense of that word) to develop an effective argument against the imposition of the death penalty.

Second, the students receive this introduction by doing work that must be done[2] in order to permit the orderly development of the defendant's post-conviction claims. While the essential need is that the petition be timely filed, frequently the work has greater significance than simply tolling the statute of limitations: a petition may represent the first time that an issue which is present in the case receives either recognition or (more likely) a relatively comprehensive treatment including an analysis of different courts' approaches to the problem. Additionally (and for the instructor's peace of mind, essentially), preparing a certiorari petition does not carry with it the risk that haunts all other work in a capital case—the possibility that failing to identify and raise a particular claim forfeits that claim in all subsequent proceedings.

Third, the clinic provides the instructor with a broad exposure to the issues currently being litigated in capital cases. It is one way (albeit hardly the most complete or practical) to "keep up with the advance sheets." As the next section suggests, exposure to this range of cases over a substantial period of time may also provide a sense of what transpires in the ordinary capital case. It is either a curse or a blessing of the academic life that our typical exposure is to the unusual judicial decision or proceeding. Depending on one's view, running a certiorari clinic is either an antidote to the curse or a tarnishing of the blessing.

A certiorari clinic may appear to be death penalty "lite" because the students enter and leave the process at a relatively early point (following appellate affirmance on direct appeal). They are not present and participating when the final habeas petition is filed or the commutation hearing begins or the last meal is served. In terms of adrenaline rush, filing a certiorari petition is simply a non-starter compared to racing to the courthouse to file a second habeas at the eleventh hour. Having worked with a very large number of students on a single case that consumed eleven years and involved all these steps (save the very last meal), my impression is that students overall are more likely to gain more substantive knowledge, experience a greater improvement in their skills, and feel a greater sense of accomplishment from participating in the certiorari clinic than by participating at any but the most exciting moments of the single case.

All death penalty litigation proceeds in the shadow of a ticking clock. While supervising the preparation of a certiorari petition is far less anxiety-producing than overseeing the filing of a second habeas petition, the stakes are still high. Depending upon whether an extension has been granted and for how long, failure to file in a timely manner can literally waste up to five of the twelve months available to a capital defendant to file a federal habeas petition. In a world in which it can take months to recruit lawyers willing to do post-conviction representation, this is unacceptable. The Court rules do not permit requests for

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[2] Title 28 U.S.C. § 2244(d)(1) (2000) requires a petitioner to file a federal habeas corpus petition within a year of the conclusion of the direct appeal in state court. The denial of a petition for certiorari concludes direct appeal and begins the running of the one year statute of limitation. United States v. Marcello, 212 F.3d 1005, 1008 (7th Cir. 2002).

extensions of the time unless made ten or more days before the due date. The vagaries of student ability and effort, illness, computer functionality, and weather will remind anyone undertaking this task what it means to be a practicing lawyer.

II. WHAT THE CLINIC CASES REVEAL: CAPITAL CASES AND GUILT

Sam Gross has argued that erroneous convictions are likely in capital cases,[3] and the clinic cases suggest that he is correct. Many people are sent to their death on less than overwhelming evidence of guilt. While "residual doubt" about guilt may lead some jurors to vote for life,[4] the certiorari cases from our clinic demonstrate either that jurors may not have doubts when such doubts would be appropriate or that jurors find it within themselves to rise above such doubts and vote for death.

Two features of the certiorari cases stand out: (a) the state's repeated reliance upon statements by the defendant to the police, co-defendants, and acquaintances as the primary evidence of guilt; and (b) the state's infrequent but disturbing willingness to seek and succeed in securing a death sentence in cases with a very weak evidentiary foundation. While these cases are awash in inculpatory statements attributed to the defendant, they are surprisingly light on eyewitness testimony, which is typically identified as the major source of erroneous convictions. These observations rest on a review of the clinic's files in the eighty-one cases in which we filed certiorari petitions through the summer of 2003.

Half of the certiorari cases involve incriminating statements by the defendant to the police, and one-third of them involve testimony that the defendant made incriminating statements to third parties. One-ninth of the cases involved both incriminating statements to the police and to third parties. Overall, there was a confession or statement to a third party in fifty-five of the eighty-one cases (68%). In nineteen cases (23%) a co-conspirator testified against the defendant: in eight of these cases this testimony was unaccompanied by any testimony as to an incriminating statement made by the defendant. Altogether in sixty-three of eighty-one capital cases (78%), the state relied, at least in part, on either the defendant's confession or incriminating statements made by the defendant to third parties or the testimony of a co-defendant, in order to convict the defendant.

The identity of the victim seemed to affect reliance on such evidence. Either singly or in combination, co-conspirator testimony, confessions, and incriminating

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[3] *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996). Professor Gross thoroughly and persuasively canvasses the reasons for erroneous convictions. Among other factors, he points to the far higher clearance rate (through arrest) in homicide cases than in other crimes and the inevitable evidentiary difficulties created by the inability of the victim to testify, which together results in the prosecution of more marginal cases and the use of questionable sources of evidence—such as jail house snitches. *See also* Richard Rosen, *Innocence and Death*, 82 N.C. L. REV. 61 (2003).

[4] Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41 (2001).

statements to third parties appear in thirty-two out of the thirty-six cases (89%) in which the deceased was a stranger to the accused, and in seven out of the seven cases (100%) in which the deceased was a police officer or security guard. These figures concerning admissions are reminiscent of police and prosecutorial practices at the time *Miranda*[5] was decided. Frank Hogan, then District Attorney of New York County, indicated that of the ninety-one homicide prosecutions pending in New York County as of December 1965, the state intended to introduce confessions in sixty-two of them (68%).[6] Other studies stimulated by the *Miranda* decision reported confessions as part of the evidence in the range of 14% to 43% of the time.[7] A more contemporary inquiry reports a rate of confessions in capital cases that appears consistent with the contemporary use of confessions overall, but a bit lower than the experience in the clinic. Scott Sundby's study of thirty-seven convictions in California capital cases found that confessions had been introduced in twelve of the cases (32%).[8]

The quality of the evidence, as well as its character, is also striking. In a number of cases (a little more than 10% of the eighty-one examined) the evidence of guilt referenced on appeal is either less overwhelming than or, at most, the equivalent of that presented in cases in which death sentences were followed by DNA exonerations.[9] Three of the certiorari cases involved murders occurring at least fourteen years prior to trial where the principal evidence against the accused was the testimony of witnesses that the defendant had admitted the crime to

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[5] Miranda v. Arizona, 384 U.S. 436 (1966).

[6] Steven Roberts, *Confessions Held Crucial By Hogan*, N.Y. TIMES, Dec. 2, 1965, § 1, at 1.

[7] NATHAN R. SOBEL, THE NEW CONFESSIONS STANDARDS: MIRANDA V. ARIZONA 141–43 (1966) (overall confession rate of 14%, ranging from 24% in homicide cases to 10% in robbery cases); Michael Wald et al., *Interrogation in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1580 tbl.F-3 (1967) (confessions employed in 19% of cases); Evelle J. Younger, *Interrogation of Criminal Defendants—Some Views on* Miranda v. Arizona, 35 FORDHAM L. REV. 255, 255–56, 261 (1966) (confessions admitted in 33% to 37% of prosecutions); James Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320, 325, 329 tbl.8 (1973) (although police questioning was successful in 67% to 69% of cases, a confession or admission was introduced in only 43% of prosecutions).

[8] Scott E. Sundby, *Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557, 1584 (1998). The considerably higher rate in the certiorari cases includes any statements made by the accused to the police which were offered by the prosecution as evidence of the defendant's guilt whereas Sundby's study may have been limited to instances in which the defendants admitted their guilt of homicide to the police.

[9] The exonerated defendants who had been sentenced to death include: Ray Krone (Arizona), Frank Lee Smith (Florida), Charles Fain (Idaho), Dennis Williams, Vermeal Jimerson, Ronald Jones, Alejandro Hernandez, Rolando Cruz (all from Illinois), Ryan Matthews (Louisiana), Kirk Bloodsworth (Maryland), Ron Williamson (Oklahoma), Nicholas Yarris (Pennsylvania) and Earl Washington (Virginia). The Innocence Project: Case Profiles, http://innocenceproject.org/case/display_cases.php?sort=last_name (last visited March 3, 2005).

them;[10] in a fourth case the murder had occurred nine years earlier, and the main evidence was again statements made to others admitting guilt (as well as a conviction for sexual assault in the area in question around the time of the murder).[11] In two other cases the defendant was convicted based upon the testimony of a co-defendant against whom all charges were dropped.[12] Another certiorari clinic defendant was convicted and sentenced to die on evidence that eyeglasses identified as his were found at the scene of the crime, that he asked his mother for an alibi for the time of the crime, and asked his girlfriend whether an individual could be traced through his eyeglasses.[13] Another death sentence resulted from a conviction based upon evidence that the defendant was one of two people who was with the victim on the night in question and that he (an African American) had previously abused three white women (the victim was white).[14] A Pennsylvania defendant was convicted and sentenced to die after two hung verdicts based on the evidence of an eyewitness who testified he knew the defendant by his first name and another witness who said that he saw the defendant with a gun of the make used in the robbery (the gun was never recovered).[15] A Mississippi jury convicted and sentenced a defendant to death on evidence that blood was found on the three-year-old victim, that he was the last person seen with the victim, and had a forty-minute window in which to commit the crime, and that the nineteen bite marks on the victim's body matched dental impressions of the defendant.[16]

Two of the defendants whose certiorari petitions were unsuccessful have secured subsequent relief on innocence-related grounds. Alan Gell was acquitted following a retrial granted because the State had failed to disclose favorable evidence (that one of his accusers may have been lying and that Gell was probably in jail or out of state the day the killing actually occurred).[17] Kennedy Brewer, who had been convicted on the basis of dental testimony concerning bite marks, won a new trial when DNA tests showed that the blood and sperm on the victim was not his.[18] I have no basis for asserting that the defendants in the other cases

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[10] Commonwealth v. Small, 741 A.2d 666 (Pa. 1999); Commonwealth v. Weiss, 776 A.2d 958 (Pa. 2001); Emery v. State, 881 S.W.2d 702 (Tex. 1994).

[11] Commonwealth v. May, 656 A.2d 1335 (Pa. 1995).

[12] Burks v. State, 876 S.W.2d 877 (Tex. Crim. App. 1994); State v. Gell, 524 S.E.2d 332 (N.C. 2000).

[13] Commonwealth v. Pursell, 495 A.2d 183 (Pa. 1985).

[14] Commonwealth v. Elliott, 700 A.2d 1243 (Pa. 1997).

[15] Commonwealth v. Harris, 703 A.2d 441 (Pa. 1997).

[16] Brewer v. State, 725 So. 2d 106 (Miss. 1998).

[17] Estes Thompson, *N.C. man acquitted of murder—Gell spent nearly a decade on death row*, CHARLOTTE OBSERVER, Feb. 18, 2004, http://www.truthinjustice.org/Alan-Gell.htm (last visited March 2, 2005).

[18] Brewer v. State, 819 So. 2d 1169 (Miss. 2002) (ordering remand for evidentiary hearing); Jimmie E. Gates, *Accused Killer's Retrial Pending: 2 Years After Favorable DNA Test, Inmate, 33, In Limbo*, CLARION LEDGER, Jan. 2, 2005, at 1.

discussed above are innocent. But it would not be shocking to learn that some of them were, given the quality of evidence against them. And these are randomly assigned, run-of-the-mill cases from a number of jurisdictions—they are likely representative of many others. Given the nearly 3500 people on death row, it is a fair guess that those whose conviction and sentence rest upon comparable evidence is well into the hundreds.

The effort to reform capital punishment over the past two centuries—to reserve it for the "truly deserving"—has proceeded on two tracks: limiting the kinds of crimes for which capital punishment is a possible penalty and expanding the ability of the sentencer to choose life over death. Well intentioned as these reforms may have been, they have never succeeded in the ultimate goal of reserving capital punishment exclusively for the most deserving, assuming we agreed upon who that was.[19] However conscientiously reforms may have been fashioned and applied initially, the repulsive nature of homicide, the challenges of proof, and the inability of doctrine to anticipate the variegated nature of human violence inevitably combined to push prosecutors and courts to expand the reach of the capital sentence. The certiorari cases confirm these pressures are at work again. With the exception of the individual who kills one other person efficiently out of personal enmity or in a sudden rage, the certiorari cases indicate that virtually any killer who could have received death prior to *Furman*[20] can and sometimes does receive death today. They also indicate that the evidence required to convict and produce a death sentence is no more impressive than that deemed sufficient in the days when Justice Stewart described receiving the death penalty as being about as predictable as "being struck by lightning."[21] It was probably hyperbole then, and, in fairness, today, but it remains a more accurate description of our current process than the claim that we have succeeded in reserving capital punishment for the indisputably guilty who are most deserving of death.

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[19] Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375 (1994).

[20] Furman v. Georgia, 408 U.S. 238 (1972) (holding death penalty unconstitutional under sentencing method then in use).

[21] *Id.* at 309 (Stewart, J., concurring).